MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

SLAIN SECURITY OFFICER'S SEXUAL HARASSMENT SUIT BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS THIS WEEK

LANSING, MI, December 9, 2002 – A case concerning two state Capitol security officers who shot and killed each other in 1997 will come before the Michigan Supreme Court this week.

The Estate of Virginia Rich is suing the State of Michigan and the Michigan State Police, saying that Rich suffered sexual harassment from fellow security officer Knute Findsen. Both were killed in the 1997 shoot-out. At issue is whether Findsen's alleged taunting of Rich about her gender, weight and professional abilities can support a sexual harassment claim (*Haynie* v. *State of Michigan*).

Also before the Court is a criminal prosecution involving a defendant who set up a meeting with a fictitious child prostitute, actually a police detective. The defendant now seeks relief from his convictions for solicitation to commit first-degree criminal sexual conduct, arguing that it was legally impossible to commit the crime because the child did not exist (*People* v. *Martin*). The Court will also hear a number of other criminal cases, as well as cases involving worker's compensation, statute of limitations, and constitutional law issues. A group of products liability cases (*Taylor* v. *Gate Pharmaceuticals*) involves plaintiffs who took the diet drugs known as Fen-Phen and Redux.

Court will be held **December 10, 11 and 12** in the Supreme Court Room on the sixth floor of the Michigan Hall of Justice. Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and might not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. For further details about these cases, please contact the attorneys.*)

Tuesday, December 10

Morning session

DANIEL v. DEPARTMENT OF CORRECTIONS (case no. 120460)
Attorney for plaintiff Tony J. Daniel: James M. Joyce/616.447.7000
Attorney for defendant Department of Corrections: George H. Weller/517.335.7995
Attorney for amicus curiae Michigan Manufacturers' Association and Michigan Self-Insurers' Association: Martin L. Critchell/313.961.8690
At issue: The plaintiff suffered from depression after he was proved to have sexually harassed women on the job. Michigan's worker's compensation statute states that those who are "injured by reason of [their] intentional and wilful misconduct" may not receive worker's compensation. Is the plaintiff barred from receiving worker's compensation benefits?
Background: Tony Daniel, a probation officer employed by the Department of Corrections, sexually harassed a defense attorney and other female lawyers. The ensuing complaints were investigated, and he was ultimately disciplined by being suspended for 10 days without pay. Later, Daniel was diagnosed as suffering from depression. He sought worker's compensation benefits, asserting that the stresses of the sexual harassment allegations, as well as the resulting investigation, hearings and grievance proceedings, led to his temporary mental disability. A worker's compensation magistrate granted benefits to Daniel for a closed period, ending with the time he recovered from his depression. Although Daniel "brought these troubles on himself by his own misconduct," his depression did arise out of and in the course of his employment, the magistrate concluded. The Worker's Compensation Appellate Commission (WCAC) reversed in a 2-1 decision. The WCAC cited the Worker's Compensation Disability Act, which provides in part that an employee "shall not receive compensation" if he is "injured by reason of his intentional and wilful misconduct." Because Daniel's own misconduct led to his depression, he was not eligible for benefits, the WCAC stated. The Michigan Court of Appeals reversed the WCAC. In a published 2-1 decision, the court stated that "the connection between [Daniel's] acts and the injury was too attenuated for the injury to have occurred 'by reason' of his acts, and his behavior did not comprise 'intentional and wilful misconduct' as contemplated by [the statute] and defined by the courts." The Department of Corrections appeals.

HAYNIE v. STATE OF MICHIGAN AND THE MICHIGAN DEPARTMENT OF STATE POLICE (case no. 120426)
Attorney for plaintiff Carol Haynie, personal representative for the Estate of Virginia Rich: Patrick J. Boog/517.333.2982
Attorney for defendants State of Michigan and Michigan Department of State Police: Margaret A. Nelson, Assistant Attorney General/517.373.6434
At issue: Where the deceased plaintiff allegedly suffered taunting and other hostile conduct because of her gender - but the comments and conduct were not sexual in nature – do those incidents support a claim for sexual harassment?
Background: On January 17, 1997, capitol security officers Virginia Rich and Knute Findsen

shot and killed each other while on duty. After the incident, Rich's estate filed an Elliott-Larsen Civil Rights Act against the State of Michigan, Michigan Department of State Police, and two state police supervisors. The plaintiff claimed that Findsen sexually harassed Rich by making hostile and offensive comments about her weight, gender, and abilities, thus creating a hostile work environment. The plaintiff further contended that, although Rich reported the harassment to her supervisors, they failed to take action, and the harassment continued until her death. The defendants argued that the sexual harassment claims should be dismissed because none of Findsen's alleged offensive conduct was sexual in nature. The attorney for Rich's estate argued that the sexual harassment claim was proper because Findsen's alleged conduct was "gender motivated." Ingham Circuit Judge Lawrence R. Glazer granted summary disposition to the defendants on the sexual harassment claim. Although Rich was allegedly "subjected to a number of unkind, nasty, hostile statements and activities," the complaint did not allege that she suffered "unwelcome sexual communication," the judge said. The Court of Appeals reversed the trial court's ruling on the sexual harassment claim. The appellate court stated that gender-motivated harassment could also establish a hostile work environment claim. The defendants appeal.

PEOPLE v. KATT (case no. 120515)
Prosecuting attorney: Aaron J. Mead/616.983.7111
Attorney for defendant Terry Lynn Katt: P. E. Bennett/313.256.9833
At issue: The defendant was tried and convicted of criminal sexual conduct with two young children. At trial, a Protective Services worker testified about her interview with one of the children and his account of the abuse. Was it error for the trial judge to admit this testimony into evidence?
Background: A Protective Services worker, acting on an anonymous tip that two children were being physically abused by their mother, went to the children's school. The worker talked with one of the children, a seven-year-old, who volunteered that "Uncle Terry" was doing "nasty sutff." The child went on to describe how Terry Katt had abused both the child and his five-year-old sister, the worker stated. Katt was charged with four counts of first-degree criminal sexual conduct. At trial, the Protective Services worker testified about her interview with the child, including what the child told her about Katt's sexual behavior with the children. Berrien County Circuit Judge John N. Fields allowed the testimony to come in. The judge noted that the testimony was inadmissible under Michigan Rule of Evidence (MRE) 803(4), the "tender years" hearsay exception. That rule provides in part that, for children under 10, "'A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding." Because the seven-year-old made more than one corroborative statement about the abuse, which the worker then repeated on the stand, the 803(40 hearsay exception did not apply, the judge concluded. However, the judge said, the testimony was admissible under MRE 803(24), which is sometime referred to as the "catchall" hearsay exception. MRE 803(24) allows admission of hearsay statements that do not fall under any other hearsay exception if there are "equivalent circumstantial guarantees of trustworthiness." Katt appealed, arguing that, because the worker's testimony was not admissible under the "tender years" rule, it could not qualify for admission under the "catchall"exception. In a published opinion, the Court of Appeals disagreed

and affirmed Katt's convictions. The defendant appeals.

Afternoon session

TAYLOR v. SMITHKLINE BEECHAM (case no. 120624)
TAYLOR v. GATE PHARMACEUTICALS (case no. 120637-41)
TAYLOR v. MEDEVA PHARMACEUTICALS (case no. 120642-46)
TAYLOR v. A. H. ROBINS (case no. 120653-54)
(Please note: Because these lawsuits involve a large number of individuals and corporations, not all parties are listed in the case captions above. These cases will be heard together.)
Attorney for plaintiffs Tamara Taylor and Lee Anne Rintz: David R. Parker/313.875.8080
Attorney for defendant Smithkline Beecham Corporation: Susan Healy Zitterman/313.965.7905
Attorney for defendant Gate Pharmaceuticals: Ronald F. Graham/248.642.7880
Attorney for defendant Medeva Pharmaceuticals, Inc.: Robert G. Kamenec/248.901.4068
Attorney for defendant A. H. Robins Company, Inc.: Ronald S. Longhofer/313.465.7000
At issue: A 1995 Michigan statute provides that, if the U.S. Food and Drug Administration (FDA) approves a drug, the drug's manufacturers and sellers may not be sued by people who claim damages from taking the drug. Is the statute constitutional?
Background: This appeal involves two cases, one filed in Washtenaw County and one filed in Wayne County. The plaintiffs are people who took the diet drugs known as Fen-Phen and Redux. The plaintiffs have sued a number of drug manufacturers and sellers, claiming that the drugs caused lung and cardiovascular injuries. In both cases, the defendants moved to dismiss the claims. They argued that a 1995 Michigan statute limited their liability. That statute provides that a drug manufacturer or seller is not liable "if the drug was approved for safety and efficacy by the United States food and drug administration and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller." The plaintiffs did not dispute that the drug was FDA-approved at the time it left the defendants' control. Instead, the plaintiffs responded that the statute violates the Michigan Constitution by delegating legislative power to the FDA. The statute amounts to a delegation of power because it allows the FDA to define which drugs may be subject to a products liability lawsuit in Michigan, the plaintiffs contended. Wayne County Circuit Judge Marianne O. Battani agreed that the statute was unconstitutional and denied the defendants' motion. In the Washtenaw County lawsuit, however, Washtenaw County Circuit Judge David S. Swartz held that the statute was constitutional and dismissed the plaintiffs' suit. In an appeal that consolidated both cases, the Court of Appeals held, in a published 2-1 decision, that the statute was unconstitutional. The defendants appeal.

Wednesday, December 11

Morning session

PEOPLE v. CLAY (case no. 120024)
Prosecuting attorney: Timothy K. McMorrow/616.336.3577
Attorney for defendant Jerry Clay: Fred Bell/517.334.6069
At issue: The defendant assaulted a corrections officer while in jail on charges of carrying a concealed weapon (CCW). However, his CCW conviction was later reversed on the grounds that his arrest was unlawful. He was also charged and convicted under a statute that makes it a felony for a "person lawfully imprisoned" to assault a jail employee. Was the defendant "lawfully imprisoned" on the original charge, and should his assault conviction be reversed?
Background: The defendant, Jerry Clay, was in jail awaiting charges of carrying a concealed weapon; he was convicted of that offense, but it was later reversed on appeal. While in jail, Clay assaulted a correction officer. He was charged with assaulting the officer under a Michigan statute, which states that "[a] person lawfully imprisoned in a jail ... who ... assaults an employee of the place of confinement or their custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony." He was convicted of that offense; Kent County Circuit Judge David Soet sentenced Clay to three to 15 years in prison. Clay sought relief from his assault conviction, arguing that, because his CCW conviction was later reversed on the basis of an improper arrest, he was not "lawfully imprisoned" when he assaulted the correction officer. Ultimately, the Court of Appeals concluded that Clay was not "lawfully imprisoned" when he assaulted the officer; the court reversed Clay's conviction. The prosecution appeals, arguing that the reversal of Clay's CCW conviction does not mean that he was not "lawfully imprisoned."

PEOPLE v. PHILLIPS (case no. 119429)
Prosecuting attorney: Janet M. Boes/989.790.5330
Attorney for defendant Paul Lewis Phillips, Jr.: Joseph S. Harrison/989.799.7609
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/517.543.7500
Attorneys for amicus curiae Criminal Defense Attorneys of Michigan: John Minock/734.668.2200, Bridget M. McCormack/734.763.4319
At issue: A Michigan court rule requires parties in a criminal prosecution to turn over expert witnesses' reports to other parties upon request. Where expert witnesses have not created reports, can a trial court compel them to do so?
Background: The defendant, Paul Lewis Phillips, was charged with second-degree murder, manslaughter with a motor vehicle, and causing death while operating a motor vehicle under the influence of alcohol. The prosecutor theorized that, in November 1999, Phillips and his friends had been drinking alcohol as part of their celebration at a Michigan State-Ohio State football game. Phillips drove with a passenger, Michael Talkington, to buy more alcohol. There was a single-car accident, in which Talkington was killed. The defense had three experts to testify to the facts of the accident and to the effects of alcohol consumption. In discovery, the prosecution asked for the defense to turn over any reports by its expert witnesses. There is no dispute that, at the time of the prosecutor's request, there were no reports from the defense experts. The prosecutor then moved to strike defense witnesses on the basis that the defense had not turned

over all reports or curriculum vitae of the defense experts during discovery. Michigan Court Rule 6.201 provides in part that "a party upon request must provide ... any report of any kind produced by or for an expert witness whom the party intends to call at trial." Ultimately, Saginaw Circuit Judge Frederick L. Borchard ordered that the defense experts must create reports to be turned over to the prosecutor. In a published per curiam opinion, the Court of Appeals reversed, finding that there was no authority for the trial judge to compel the defendant to have his expert witnesses create reports. The prosecution appeals, arguing in part that the defense experts must be required to disclose the nature of their testimony in order to prevent unfair surprise at trial.

LAPEER COUNTY CLERK v. LAPEER CIRCUIT COURT AND COUNTY OF LAPEER (case no. 121400)
Attorney for plaintiff Lapeer County Clerk: Michael J. Hodge/517.487.2070
Attorney for defendant Lapeer Circuit Court: Deborah Anne Devine/517.373.1162
Attorney for defendant Lapeer County: Craig W. Lange/ 248.619.2500
At issue: This case presents a dispute over responsibility for records, filings, and other clerical matters in the family division of circuit court. The answer will affect Michigan's family courts.
Background: Michigan's family division of circuit court was created by a 1996 statute. Under a local administrative rule, the Lapeer Circuit Court designated employees of that county's former probate court to perform certain clerical functions of the family division of the circuit court. The local rule stated in part that probate court employees were responsible for records, scheduling and filings in juvenile, child protection, and adoption proceedings. The County Clerk sued, arguing that the rule assigned to others duties that belonged to her office. The Court of Appeals agreed and struck down parts of the local rule that directed family court staff, rather than the County Clerk, to perform the duties assigned to the Clerk by statute or court rule. The Court of Appeals declared lawful the remaining portions of the local rule. The Michigan Supreme Court reversed, stating that the Court of Appeals lacked jurisdiction over the matter and that only the Supreme Court would have jurisdiction over such a claim. The Lapeer County Clerk filed a new complaint with the Michigan Supreme Court, and the dispute is now before the Supreme Court.

Afternoon session

PEOPLE v. HAWKINS (case no. 120437)
Prosecuting attorneys: Timothy K. McMorrow, T. Lynn Hopkins/616.336.3577
Attorney for defendant Christopher Lamar Hawkins: Helen C. Nieuwenhuis/616.451.2190
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Ronald J. Bretz/517.371.5140
Attorney for amicus curiae Michigan Department of Attorney General: David C. Cannon/734.525.4452
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Olga Agnello/313.224.5777
At issue: A search warrant was based on information from an unidentified informant; a trial judge later ruled that there was nothing to show that the unnamed source was credible or that his information was reliable. Should the evidence seized in the search based on the warrant be

suppressed?
Background: On November 3, 1999, defendant Christopher Hawkins was charged with a number of drug-related and other charges after a search of his residence turned up cocaine, guns and other items. The magistrate who issued the search warrant did so based on a police officer's affidavit, which in turn was based on information the officer received from an unidentified informant. Hawkins moved to quash the search warrant and suppress the evidence that was seized in the search. Under Michigan law, a search warrant can be based on information from an unnamed person if the affidavit includes "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." Kent County Circuit Judge Donald A Johnston, III, granted Hawkins' motion. The judge found that there was nothing to show that the unnamed informant was credible or that the information given was reliable. The charges were then dismissed. The judge also stated that some of the information on which the warrant was based was stale. The officer's affidavit stated that he "received information from an informant on 10/14/99 that the resident of 921 Humbolt S.E. was involved in the sale of narcotics." It was unlikely that someone dealing in cocaine would remain in the same location for three weeks, the judge said. The Court of Appeals affirmed the circuit judge's decision in an unpublished per curiam opinion. The prosecutor appeals, arguing that the Fourth Amendment does not require suppression of evidence that was seized in good-faith reliance on a search warrant. The prosecutor also contends that, although the magistrate violated the statutory requirements for a search warrant, that violation should not require the suppression of reliable evidence.

PEOPLE v. SCHERF (case no. 121698)
Prosecuting attorney: Roy R. Kranz/989.772.0911
Attorney for defendant Michael Brandon Scherf: John W. Lewis/989.773.0004
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Ronald J. Bretz/517.371.5140
Attorney for amicus curiae Michigan Department of Attorney General: David C. Cannon/734.525.4452
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/313.833.3496
At issue: Under the "exclusionary rule," evidence seized in an unlawful search is not admissible and must be excluded. The United State Supreme Court has recognized a "good faith exception" to the exclusionary rule in cases where police officers relied on warrants they believed were valid. Should the "good faith exception" apply where the defendant was arrested on a bench warrant that turned out to be defective?
Background: The defendant, Michael Brandon Scherf, pled guilty to manufacturing with intent to deliver between five and forty-five kilograms of marijuana. He was placed on Holmes Youthful Trainee status and sentenced to probation. Scherf then allegedly violated his probation. The probation officer filed a petition for a bench warrant, but the petition was not supported by an affidavit as required by the Michigan Court Rules. Despite the lack of affidavit, a district court judge issued a bench warrant for Scherf's arrest. Scherf was arrested, and a related search

revealed that Scherf was carrying approximately seven grams of marijuana. He was charged with possession of marijuana. Scherf moved to suppress the evidence and dismiss the charges, arguing that the arrest was illegal because the bench warrant petition was invalid. The district court denied the motion, but Isabella County Circuit Judge Thomas A. Beale reversed. There is no "good faith exception" to the exclusionary rule in Michigan, the judge held. The Court of Appeals affirmed Judge Beale's ruling, but said it did so only because it was bound by an earlier Court of Appeals decision. The prosecution appeals.

Thursday, December 12

Morning session only

PEOPLE v. MARTIN (case no. 121050)
Prosecuting attorney: Thomas Richards/248.858.0656
Attorney for defendant Dean Madison Martin: Desiree M. Ferguson/313.256.9833
At issue: Through the Internet and by phone, the defendant arranged to meet a fictitious child prostitute, who was actually a detective posing both as the child and as a go-between for the defendant. Because the child did not exist, was it legally impossible for the defendant to solicit with intent to commit first-degree criminal sexual conduct? Must his convictions for that offense be reversed?
Background: The defendant, Dean Madison Martin, responded to a fictitious Internet advertisement in a child pornography chat room; the ad offered sex with child prostitutes. In reality, a detective had placed the ad. Martin followed up on the ad by telephone and on the Internet, communicating with the detective, who posed both as a nine-year-old child prostitute, "Sandi," and as an individual named "Mike" who would facilitate child prostitution. Martin was arrested at the hotel where he had arranged to meet "Sandi," and officers seized evidence that Martin had in his possession, including the agreed-upon price of $350. Among the charges against Martin were solicitation to commit first-degree criminal sexual conduct. Martin moved to dismiss the charges on the basis of entrapment. He also moved to quash the evidence seized at his arrest, arguing that it was legally impossible for him to commit the offense of solicitation to commit first-degree criminal sexual conduct because "Sandi" did not exist. After Oakland County Circuit Judge Denise Morris denied the motions, Martin pled guilty to four counts of distribution of child sexually abusive material, one count of child sexually abusive activity, and three counts of solicitation to commit first-degree criminal sexual conduct. The plea agreement provided that Martin retained the right to appeal the trial court rulings on his motions to quash and to dismiss. In an unpublished per curiam ruling, the Court of Appeals upheld Judge Morris' ruling on Martin's entrapment claim. The Court of Appeals went on to dismiss Martin's three convictions of solicitation with intent to commit first-degree criminal sexual conduct. "Because 'Sandi' was actually a police detective, there was no evidence that [first-degree criminal sexual conduct] could have resulted from defendant's solicitation," the panel concluded. The prosecution appeals.

GLADYCH v. NEW FAMILY HOMES, INC. (case no. 119948)
Attorney for plaintiff Robert Gladych: Patrick Burkett/248.355.0300
Attorney for defendant New Family Homes, Inc.: Julie Nichols/248.649.7800
At issue: Where the complaint was filed within the three-year statute of limitations, but the defendant was not served with the complaint until after the three years ran out, is the claim barred by the statute of limitations?
Background: On January 22, 1999, the plaintiff, Robert Gladych, sued New Family Homes, Inc., claiming negligence at a construction site owned by New Family Homes. The complaint was filed within three years of the date – January 23, 1996 – when Gladych claimed he was injured. In March, service of process was forwarded to Macomb County Sheriff's Department, and the plaintiff also tried to serve the defendant by certified mail. The trial court extended the time to serve the summons until July 20, 1999. The defendant was not actually served until May 4, 1999. New Family Homes moved to dismiss the case. The defendant argued the three years continued to run until the plaintiff either delivered the summons and complaint to a deputy sheriff for service or served the complaint on New Family Homes. Because the plaintiff took neither action by January 23, 1999, the action was barred, the defendant contended. The trial court judge granted the motion and the plaintiff appealed. In an unpublished decision, the Court of Appeals reversed and reinstated Gladych's claim. "Because plaintiff filed this action before the three-year limitations period expired, it was timely filed," the panel stated. New Family Homes appeals.

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